

Background

[4] Mr Hood was employed by Connector Systems in October 2010. He was one of two South Island business development managers and performed a sales and marketing function. He had a written employment agreement which, for the purposes of this dispute, had the following pertinent clauses.

[5] Hours of work:

5.1 Your hours of work are specified in Schedule A, with a half hour lunch break. You must devote the whole of your time during normal business hours to the duties of your position and such additional hours (including weekends) as are necessary to enable you to perform your duties effectively. Your remuneration has been set in anticipation that additional hours may be required.

[6] Schedule A provides:

Days and hours of work: 8.30am to 5.30pm, Monday to Friday.

[7] Schedule A has another provision headed *Other benefits*. It reads:

Fuel Allowance on a fuel card of up to \$400.00 for business use only.

[8] The employment agreement also has a detailed two page schedule covering *confidentiality, intellectual property and restraint of trade*. Contained therein is:

4.1 Upon termination of your employment, you agree that you will not, for a period of 3 months, without our express written consent, which will not be unreasonably withheld, directly or indirectly approach, canvas, entice away, solicit, undertake work for or act for either:

(a) A person or entity who is, at the date of termination, or was in the 12 months preceding termination, a client of ours and/or of Connector Systems Limited; or

(b) Any person whose business as a client was actively being sought by us at the date of termination and with whom you had contact during the six months preceding the date of termination.

[9] There is also a completeness clause. It reads:

This employment agreement represents a full record of the agreement entered into by you and us and supersedes any existing agreements, written or oral, or customary practices being observed between the parties. Any changes or additions to this agreement will not be binding unless mutually agreed and recorded in writing.

[10] Connector Systems had a supervision regime which saw Mr Hood answer to three product managers, Paul Wainhouse, Mark Dasent and Kevin Swainson.

[11] Mr Hood claims his fuel allowance provision differed from that specified in the written employment agreement. He says he was confused as to how the system would work if fuel could only be used for work purposes when it went into a privately owned vehicle which was also used for private purposes. He says he questioned Mr Wainhouse who advised it was *swings and roundabouts* given Connector Systems did not contribute to other running costs. Mr Hood claims he was told to use the card for all purchases and any in excess of \$400 a month would be deducted from his salary. He claims he asked that his employment agreement be amended but was told *no* due to tax issues.

[12] That aside, the employment progressed without issue until February 2012 with Connector Systems' witnesses saying they were pleased with Mr Hood's performance until the events which led to the dismissal.

[13] On 17 February 2012, Mr Dasent advised staff he intended holding a sales conference on Saturday 24 March. He asked to be advised if anyone could not make it before he confirmed the date.

[14] Mr Hood responded with *SATURDAY?* which was followed by a couple of further exchanges. They ended with one from Mr Dasent confirming the conference would be held in a weekend.

[15] In his brief, Mr Hood says he as unable to attend due to childcare commitments and advised Mr Dasent of that. He says he had no response and after a couple of weeks decided to raise it with another of his managers, Mr Wainhouse, when he visited Christchurch on 15 March. He says:

...he [Wainhouse] said that was okay but I'd better talk to Mark Dasent about it as he was arranging it, he said he would pass on my message to Mark when he returned to Auckland.

[16] That led to Mr Dasent telephoning Mr Hood on the 16th. Mr Hood says Mr Dasent tried to get him to make alternate arrangements to which:

I explained to Mark that I already work 50 to 60 hours a week and need my weekends to relax and spend time with my family, Mark said that was fine and we ended the conversation.

[17] Mr Dasent has a different view. He says he advised Mr Hood he was not impressed by the lack of commitment and reiterated the meetings' importance.

[18] The following day Mr Hood sent Mr Dasent an email advising he was *not prepared to give up my weekend* and confirming a decision not to attend.

[19] Mr Dasent replied later that day advising his disappointment, the fact he thought this was a once-a-year opportunity to get everyone together and advising he still required the presentation Mr Hood to prepare on his plans for the upcoming year.

[20] The following day, and having spoken to Mr Dale Smith, the managing director, Mr Dasent sent a further letter to Mr Hood. The letter advises the matters to be discussed at the conference were integral in assisting Mr Hood to successfully perform his role. It goes on to refer to clause 5.1 of the employment agreement and the fact that requires the performance of weekend work if necessary. The letter closes by instructing Mr Hood to attend the meeting and advising flights, the details of which were appended, had been booked.

[21] Mr Hood says he decided to comply and that led to a telephone conversation with Mr Dasent on 22 March over the presentation. He goes on to say the situation changed later that day when he had a telephone call from his mother who was going to look after the children that weekend stating she was no longer able to do so.

[22] Mr Dasent has a different view. He accepts the two spoke on the 22nd but claims Mr Hood told him during the conversation he was not going to attend the conference as he had a parenting order that required him to look after his children that weekend. Mr Dasent describes the conversation as robust and accepts if is likely he swore as Ms Hoods alleges

[23] The conversation was followed with an email from Mr Hood to Mr Smith. The email reads:

Not sure where to go from here, i am unable to attend this Saturday, conversations with Mark have left me very unhappy, my last conversation with Mark at 2.15 today he swore at me then hung up.

I have a parenting order stating i am responsible for my children every second weekend, this is a legal document issued by Family Court, i have tried to arrange alternative care but have been unsuccessful due to ill family.

The second part of this is the time factor, Mark has attempted to help me with this but after understanding how much information was required from every customer and how much more time i would need to commit i just about fell off my chair, i dont have any free time, i struggle to keep up with internal and customer demands on my time, i already put in 50+ hours every week, by the weekend i am totally exhausted, i made a decision based on my commitment to my customers to put them first, because of this right or wrong i have not gained enough data to put a presentation together in time.

... however I can't just keep giving, i have to balance my work and family time meaning i have to draw the line somewhere. ...

[24] Mr Hood did not attend the conference nor did he provide the required presentation. At around the same time, Mr Dasent was approached by the Australia/New Zealand manager of one of Connector Systems major suppliers, Ruckas. He asked why Mr Hood appeared upset with Connector Systems and what was going on. He said Mr Hood complained to one of his staff about the poor treatment he was receiving over his non-attendance at the sales conference. Mr Dasent says the tone of the approach led him to conclude Mr Hood had been critical of Connector Systems. He goes on to say he was concerned about this and the fact one of his staff would make comments that could prejudice Connector Systems' relationship with a significant partner.

[25] Mr Hood's conduct also concerned Mr Smith who started to make inquiries. These led to his obtaining information about Mr Hood's use of the fuel card and he did not like what he saw. Mr Smith and Mr Dasent discussed the usage and concluded it might warrant disciplinary action. That led to a letter from Mr Smith to Mr Hood dated 26 March 2012 inviting asking the latter attend a disciplinary meeting. It advised a desire to discuss:

- a. Mr Hood's recent conduct and, in particular, his failure to comply with a reasonable instruction to attend the sales conference along with his failure to prepare the required presentation.

- b. His fuel card usage; and
- c. The comments made to Ruckas staff.

[26] The letter closes by advising the concerns, if established, could reflect badly on the company and be considered prejudicial to its interests and that may, in turn, constitute serious misconduct warranting dismissal.

[27] The meeting was scheduled, by agreement, for Thursday, 29 March 2012 at Connector Systems' office in Auckland. Mr Hood was encouraged to bring a support person or representative but he complains it was impractical to do so given the venue. He says he raised this concern upon arrival but, notwithstanding, agreed to continue with the meeting unrepresented.

[28] Mr Hood says little about the meeting or its conduct in his evidence. Mr Smith, however, gave lengthy evidence. He says the allegations were reiterated and Mr Hood then explained his childcare arrangements and the fact he had intended going to Auckland till the arrangement with his mother fell through. His explanation about the fuel card involved an alleged administrative error in respect of a January payment before discussing his understanding of the rules regarding the purchase of fuel. He denied *bad mouthing* Connector Systems.

[29] There was an adjournment during which Mr Smith says he made inquiries of both the administration staff and Mr Wainhouse (regarding the alleged amendment to Mr Hood's employment agreement in regard to fuel purchasing). He says these did not support Mr Hood's contentions but accepts he did not advise Mr Hood of that. During the adjournment, Mr Dasent and Mr Smith also discussed the responses. They concluded the failure to attend the conference constituted misconduct and the other two allegations had substance with both amounting to serious misconduct. They decided to dismiss and advised Mr Hood of that when the meeting resumed. Mr Hood was asked to return his laptop and phone, which he did, and he then departed.

[30] The following day, 30 March 2012, the other South Island employee resigned. Mr Dasent suggested to Mr Smith their needs were now such they might revisit the decision to dismiss as he felt Mr Hood may have learned from the process. Mr Smith was not convinced but conceded an approach could be made. He did, however, add the proviso Mr Hood would have to show contrition and admit wrongdoing, and any return would be accompanied by a final written warning.

[31] Mr Dasent approached Mr Hood who was non-committal and said he would need to consult his partner. That he did and he later sent a text message reading:

Hi Mark, just spoke with Deb and I am happy to discuss how things would work if we were to go forward.

[32] Mr Daesnt then phoned advising warning would be given. Mr Hood says he responded that was unacceptable as he did not accept he had done anything to justify a final written warning. He says he told Mr Dasent he would accept a verbal warning for not attending the sales conference but the other matters had to be *wiped*.

[33] Mr Dasent has a different view. He says he made it clear a return was conditional upon acceptance of the final written warning and he followed up with a written précis of the proposal. He goes on to say the response came in the form of a telephone call from Mr Tonner the following day. He says the approach was aggressive and included a demand any return be accompanied with a compensatory payment. Mr Dasent says he advised Connector Systems still believed he had committed serious misconduct and the offered reprieve was not going to be accompanied by a payment. With the positions entrenched discussions ceased and the company provided written confirmation of the dismissal as originally advised on 29 March 2012.

[34] Mr Hood commenced employment with one of Connector Systems customers on 18 June 2012. He denies he then did anything that would have breached the restraint he previously had with Connector Systems.

Determination

The dismissal

[35] As already said Connector Systems accepts it dismissed Mr Hood. In doing so it accepts it is required to justify the dismissal.

[36] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

- [37] In applying the above test the Authority must consider whether:
- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
 - b. The employer raised its concerns with the employee prior to taking action;
 - c. The employer gave a reasonable opportunity for response;
 - d. The employer genuinely considered the explanation before taking action; and
 - e. Any other appropriate factors.

[38] The events after 29 March are, in my view, irrelevant. Connector Systems decided to dismiss on 29 March and advised Mr Hood of its decision that day. Given that is the decision it ultimately actioned, albeit after a temporary consideration of alternatives, that is the decision it is required to justify.

[39] I have considered the issue of resources and note Connector Systems is a relatively small employer and conducted this process without professional assistance. I do not therefore expect an example of perfection but, that said, I conclude the process met the requirements of the Act.

[40] Sections 103A(3) (b) to (d) summarise that which has long been considered the minimum requirements of a fair process. An employer is required to put issues in its mind, allow an explanation and consider them.

[41] The evidence leads me to conclude Connector Systems has complied with these requirements. Its concerns were enunciated in both the letter and the meeting. They were discussed and Mr Hood had an opportunity to respond. His answers were considered and further enquiries made so a conclusion could be reached about the explanations veracity.

[42] An acceptable process gives a base from which conclusions could properly be reached by the employer. In this instance, and having considered the evidence, I conclude those reached were within the range available to a reasonable employer in the circumstances.

[43] While the failure to attend the meeting in Auckland was only considered misconduct, it is clear it was in contravention of a request Connector Systems could reasonably make given an express provision regarding hours of work in the employment agreement. It granted Connector Systems an ability to require weekend work if necessary.

[44] It is also clear given the documentary evidence, and notwithstanding his assertions to the contrary, Mr Hood did not consider it a priority and was intent on avoiding the conference if possible. That would appear to be confirmed by his failure to prepare the presentation. If he was going to attend the presentation would undoubtedly have been completed. Given the evidence I conclude Connector Systems could conclude, as it did, the absence was deliberate and in contravention of Mr Hood's contractual obligations. In other words, it was clearly misconduct.

[45] There is then the fact Mr Hood's use of the fuel card contravened the express provisions of his employment agreement. The agreement states business use only. His argument the agreement was altered is nullified by another express provision – the completeness clause and the evidence also shows his excuse was considered, with further enquiry being made which nullified its veracity.

[46] Even if that were not the case the evidence exhibits behaviour no reasonable person could considered appropriate – namely multiple fills on the same day using different fuel types and, it would appear, fuelling a boat as well as vehicles.

[47] My initial view is the circumstances are such Connector Systems could conclude Mr Hood had misused the card in a way which provided an improper financial benefit contrary to express provision of the agreement the parties had. That is misconduct which could justify dismissal. The only doubt arises from the fact neither party called Mr Wainhouse and I could not test the hearsay claim he had not agreed to amend Mr Hood's employment agreement. That said I accept Mr Smith's evidence in regard to his enquiries and the information he had when he made his decision to dismiss. I also note Mr Hood did not call Mr Wainhouse to confirm the alleged amendment which did not help him. I therefore confirm the initial view.

[48] Similarly I conclude Connector Systems could disregard Mr Hood's denial regarding comments allegedly made to an employee of Ruckas. The detail known to the Ruckas manager was such it could only have come from a knowledgeable source.

There is no evidence or suggestion that source was anyone other than Mr Hood as stated by Ruckas. The comments were critical of Connector Systems and could open the door to a conclusion Mr Hood had breached his duty to protect his employers interests.

[49] In other words there was sufficient evidence Mr Hood had, on a multiplicity of occasions, breached various duties he owed his employer. I conclude, given the evidence, those breaches could be considered serious given all were in contravention of express terms of the employment agreement.

[50] For these reasons I conclude the decision to dismiss was one a fair and reasonable employer could have reached in the circumstances. Mr Hood's claim of unjustified dismissal therefore fails.

Penalties and damages

[51] Turning to the counter claims. Connector Systems seeks two penalties and reimbursement for the fuel improperly charged to it by Mr Hood.

[52] A penalty is sought for an alleged breach of the restraint (8 above). The restraint precludes Mr Hood from working for a client for three months after termination. That period ended on 29 June yet Mr Hood commenced with a client of Connector Systems on 18 June.

[53] In deciding this claim I must be cognizant of the fact a covenant in restraint of trade is, prima facie, unenforceable unless reasonably necessary to protect proprietary interests of the former employer and is in the public interest (*Gallagher Group Ltd v. Walley* [1999] 1 ERNZ 490).

[54] In support of the claim Mr Smith spoke of confidential information regarding clients and pricing but he also dwelt on the fact Connector Systems has subsequently lost some of the business it used to have with Mr Hood's new employer. I am left doubt the existence of a legitimate proprietary interest and note the alleged business loss is not a proprietary interest and there is no evidence that damage occurred during the period of restraint. I also have the fact the residue of the restraint (less the two weeks) is effectively de-minimis and Mr Hood was under a duty to mitigate his loss. Having considered the evidence I conclude this is not a situation in which a penalty should be considered.

[55] A second penalty is sought for breaching the provision which restricted fuel use for work purposes. The conduct was addressed at the time with Mr Hood's dismissal. That is a significant penalty and another is not justified. Even if that were not the case, a penalty is a fine. It requires comprehensive evidence of a wilful and deliberate breach. While I have accepted there was more than sufficient evidence for Connector Systems to reach the conclusion Mr Hood breached his employment agreement and discount his explanation, I note they need only reach their conclusion on the *balance of probability*. Here the threshold is higher and a niggling doubt Mr Hood's explanation had validity must remain given Mr Wainhouse was not called. The threshold required for the imposition of a penalty has not been reached.

[56] The final matter is the claim for damages. This is essentially a request Connector Systems be reimbursed for the fuel improperly charged to its account. It estimates those charged total \$553.15. While I have concluded this benefit was expressly precluded by Mr Hood's employment agreement the same niggling doubt expressed in 55 above must remain. I therefore reject the request.

Conclusion

[57] For the reasons expressed above I conclude Connector Systems has justified its decision to dismiss Mr Hood. His claim of unjustified dismissal therefore fails.

[58] I also conclude that while Mr Hood most probably contravened his employment agreement, his breaches do not warrant the imposition of a penalty or an award of damages. The penalty already suffered, namely dismissal, is sufficient.

[59] Costs are reserved.

Mike Loftus

Member of the Employment Relations Authority